

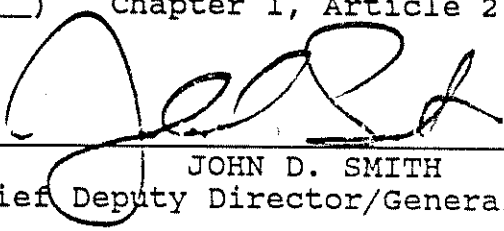
CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA¹

RECORDED FILED
JUN 13 1988

In re:) 1988 OAL Determination No. 7
Request for Regulatory)
Determination filed by) [Docket No. 87-013]
Jim Moore concerning the)
Department of Rehabili-) May 12, 1988
tation's Policies re)
Rehabilitation Counselor) Determination Pursuant to
Production Goals or) Government Code section
Standards²) 11347.5; Title 1, California
Code of Regulations,
Chapter 1, Article 2

Determination by:


JOHN D. SMITH
Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney
Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law was whether certain Department of Rehabilitation policies relating to vocational rehabilitation counselor production goals or standards were "regulations" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that:

- (1) Insofar as the Department may have a policy directing counselors to work only with clients who may be fully rehabilitated within 90 days and to offer these clients only clothing and job seeking skills, such a policy has not been adopted in compliance with the Administrative Procedure Act.
- (2) In all other respects, the policies complained of, insofar as they exist, are not quasi-legislative "regulations," but rather are elements of the legislative budget process.

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THE ISSUE PRESENTED 3

The Office of Administrative Law ("OAL") has been requested to determine⁴ whether certain Department of Rehabilitation ("Department") policies relating to rehabilitation counselor production goals or standards are "regulations" as defined in Government Code section 11342, subdivision (b), and therefore in violation of Government Code section 11347.5, subdivision (a).⁵

THE DECISION 6, 7, 8, 9

The Office of Administrative Law finds that¹⁰:

- I. A departmental policy allegedly requiring that counselors in the Southern Region only work with clients who are within 90 days of going to work, and then only offer these clients clothing and job seeking skills (1) is subject to the requirements of the Administrative Procedure Act (APA), (2) is a "regulation" as defined in the APA, and (3) is therefore in violation of Government Code section 11347.5, subdivision (a).
- II. In all other respects, the policies complained of, insofar as they exist, are not quasi-legislative "regulations," but are rather elements of the legislative budget process.

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

The California Department of Rehabilitation, one of ten departments currently located in the Health and Welfare Agency, was created in 1969. The Department's enabling act is located in Division 10 of the California Welfare and Institutions Code,¹¹ from which the following quotations are drawn. (All otherwise undesignated section references are references to the Welfare and Institutions Code.)

The Legislature created the Department ". . . to assist and encourage handicapped individuals to attain their maximum usefulness and self-sufficiency. . ." by means of "vocational rehabilitation" ¹² The above policy, the Legislature found, "should be carried out by strengthening the existing program of vocational rehabilitation, consolidating the basic rehabilitative services in a Department of Rehabilitation . . . [and] strengthening and developing services where needed" ¹³ Further, in compliance with federal requirements,¹⁴ the Legislature designated the Department the sole state agency for the administration of the state plan for vocational rehabilitation services, including decisions regarding eligibility, and nature and scope of vocational rehabilitation services.¹⁵

The Department's formally adopted regulations are located in Title 9 of the California Code of Regulations (CCR) (formerly known as the California Administrative Code). The Department also makes use of the "Regulations and Procedures Manual," the "Client Tracking System Handbook," the "Rehabilitation Administrative Manual," the "Habilitation Services Ratesetting Manual,"¹⁶ and "Administrative Directives."

Authority ¹⁷

Welfare and Institutions Code section 19006 provides:

"The [Department of Rehabilitation] may adopt, amend, or repeal, in accordance with the [APA] such rules and regulations as may be reasonably necessary to enable it to carry out its duties and powers." [Emphasis added.]¹⁸

Applicability of the APA to Agency's Quasi-Legislative Enactments

Welfare and Institutions Code section 19006, quoted above, expressly states that the Department's quasi-legislative

enactments are subject to the procedural requirements of the APA.¹⁹

Additionally, the APA applies to all state agencies, except those "in the judicial or legislative departments."²⁰ Since the Department is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.²¹

General Background

To facilitate understanding of the issues presented in this Request, we set forth the following discussion of pertinent statutory and regulatory history, as well as the undisputed facts and circumstances that have given rise to the present Determination.

Vocational rehabilitation counseling services are provided by approximately 677 counselors located in over 100 branch and district offices throughout California. Local offices are organized into 18 districts. A district administrator is in charge of each district. The 18 districts are organized into three "regions"--Northern, Los Angeles, and Southern. The Southern Region encompasses the Anaheim, Santa Barbara, Fresno, San Diego, Riverside, and San Bernardino districts.

In charge of each Region is an assistant deputy director. The three assistant deputy directors report to the Deputy Director, Field Operations, Ferd Shaw ("Deputy Director Shaw"), who in turn reports to the Director. The Request under review concerns policies allegedly issued in 1986 by the Southern Regional Assistant Deputy Director, Helen Martin ("Assistant Deputy Director Martin").

Pursuant to the state law governing public employee collective bargaining,²² the Department's rehabilitation counselors are part of state employee bargaining unit 19, health and social services/professional employees. Since 1982, the exclusive bargaining agent for unit 19 has been the American Federation of State, County and Municipal Employees ("AFSCME" or "the Union"). The Memoranda of Understanding ("MOU") between AFSCME and the State of California for 1982-84, 1984-85, 1985-87, and 1987-88 reflect continuing discussions concerning the workload of rehabilitation counselors employed by the Department. During 1986, when the matter now before us apparently arose, section 67 of Article XVIII of the 1985-87 MOU provided:

"Rehabilitation Work Standards

"a. AFSCME shall be notified prior to the Department of Rehabilitation establishing new statewide performance

standards or substantially modifying existing standards for Vocational Rehabilitation Counselors or Vocational Psychologists. The Department, at the request of the Union, shall meet and discuss the implementation of such standards. The Department will give full consideration to ideas, concerns, and proposals made by AFSCME.

"b. AFSCME recognizes the Department's right to evaluate counselor performance and [sic] the evaluation method."

Jim Moore, the requester, was in 1986 employed by the Department as a rehabilitation counselor and was at that time Chair of the Union's Rehabilitation Occupational Committee. On May 29, 1986, Assistant Deputy Director Martin, met with the Southern Region District Administrators to discuss various matters, including development of the fiscal year 1986-87 departmental budget. According to the Department's verified Response:²³

"It was explained that district budgets are negotiated and that the statewide average was 3.9 [rehabilitation] plans and 2.4 [completed] rehabilitations per counselor per month There was some confusion at the meeting over actual expenditures, reflected by expenditure and encumbrance statements, and projected expenditures, reflected by budget summaries. After the meeting, Martin sent a clarifying telex to the Southern Region District Administrators explaining that the average number of rehabilitations per counselor per month was to be used for budgeting purposes, that the actual production goals for individual counselors would vary and that the May 16, 1986, Budget Summary was not accurate for budgeting purposes and should be destroyed

"Requestor wrote to Martin on June 20, 1986 [on behalf of AFSCME], asking for clarification of an alleged new production policy requiring 4 plans and 2.9 rehabilitations per month Martin responded in writing on June 30, 1986, stating that there was no new production policy in effect, and that the May 29, 1986, meeting and subsequent telex concerned general averages that were used to budget for the then upcoming fiscal year"

The Request consists of a 3-page handwritten letter, the two required declarations, and eight unlabeled attachments.²⁴ The Request is not a model of clarity. We can, however, sum up the allegations as follows:²⁵

- (1) As a matter of policy, the Department increases rehabilitation counselor production goals (or standards) each year, resulting in a decrease of funds and services available to the severely handicapped; in particular,

beginning in 1986, each counselor has been ordinarily required to complete four plans per month and 2.9 rehabilitations per month, with an absolute minimum of 2 rehabilitations per month;

- (2) Departmental policy requires that counselors in the Southern Region (a) only work with clients who are within 90 days of going to work and then (2) only offer these clients clothing and job seeking skills.
- (3) (Impliedly) the 4 plans/2.9 rehabilitations per month policy (a) violates section 67 of the 1985-87 Memorandum of Understanding between the union representing rehabilitation counselors and the State of California and (b) is contrary to "the professional nature of the [rehabilitation counselor] job and professionalism as defined in the SEERA Act."

The third contention will not be considered here; it does not involve an alleged violation of Government Code section 11347.5 and thus is beyond the scope of these proceedings.²⁶ We will now turn to a discussion of the first and second contentions, which we will refer to as "challenged rule one" and "challenged rule two," respectively.

II. DISPOSITIVE ISSUES

There are two main issues before us:²⁷

- (1) WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

" . . . every rule, regulation, order or standard of general application or the amendment, supplement or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure" [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]" [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, does the informal rule either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.²⁸

ANALYSIS--Challenged Rule One-Numerical Quotas

In its Response,²⁹ the Department denies that it has any statewide numerical production goals or standards and denies that there is a policy requiring individual counselors to meet statewide averages or any statewide figure for either performance standards or production goals. The Department states that supervisors meet annually with each counselor to jointly establish individual reasonable production goals; that such projected goal expectations are not considered performance standards. The Department concedes, however, that "specific production figures" are used in budget preparation. The Department states:

"The specific production figures discussed were in the context of district budget preparation. Each full time counselor position is allocated a certain amount of funds for client expenditures based on the projected number of clients that will be rehabilitated. A major portion of each district's budget is composed of the combined client expenditure funds of its counseling staff. Martin expressed her desire at the May 29, 1986, meeting with her staff and subsequently in the telex to her staff and correspondence to requestor, that the Southern Region District Administrators prepare budgets at no less than the statewide average and that they rely on actual expenditure and encumbrance figures, while discarding potentially erroneous expenditure projections"

"30

For purposes of analysis, we will assume that the three quotas referred to in the Request are in fact utilized solely in the budget process. We need not address what is ordinarily the first question in the "regulation" inquiry--the question of whether the quotas would constitute a "standard of general application"--because we conclude that it is clear that the second prong of the "regulation" test has not been satisfied. As used in the budget process, the above noted quotas do not concern "a law administered by the agency". The budget process is conducted directly by the Legislature, with input from individual agencies, primarily via the Governor's Budget as prepared by the Department of Finance (DOF).³¹ Budget requests are then scrutinized by the Legislative Analyst,³² by budget committees in each house, and sometimes by each house prior to passage of the annual budget bill.³³ Workload data is often utilized by agencies in internal budget preparation, as well as in budget material prepared for submission to the DOF, the Legislative Analyst, and the budget review subcommittees.

This budget-drafting process is best characterized as "legislative" in nature, rather than "quasi-legislative".³⁴ That is, after extensive review of pertinent information, including but not limited to workload data/caseload statistics, etc., the Legislature itself enacts the budget. The budget is not independently produced by each agency pursuant to a grant of delegated rulemaking power. Indeed, holding that--in general--caseload figures had to be adopted pursuant to the APA before they could be used in internal agency budget preparation (or in materials submitted to DOF or the Legislative Analyst) would lead to absurd consequences. If the Department had to adopt regulations specifying that rehabilitation counselors had to complete 2 rehabilitations per month before that assumption could be utilized in budgeting, the budget process would be paralyzed. What if a certain caseload figure were adopted pursuant to the APA? What would happen if the particular allocation of resources derived from this staffing assumption were disapproved by the

DOF? by the Legislative Analyst? by the Legislature? by the Governor?

As is the case with any other proposed statutory change, the legislative budget process provides ample opportunities for public participation at a number of points, notably in subcommittee hearings.³⁵ As part of this process, individual state agencies must remain free to attempt to influence the outcome of the budget process, just as they must remain free to propose amendments to the statutes they are charged with enforcing.³⁶ Social and economic changes often necessitate policy and budgetary changes.

ANALYSIS--Challenged rule two--90 days to complete/only two services

According to the requester, Departmental policy requires that counselors in the Southern Region (a) only work with clients who are within 90 days of going to work and then (b) only offer these clients clothing and job seeking skills.

This twofold rule is clearly a standard of general application: it applies to all members of an open class, i.e., all residents of the Southern Region who apply for assistance.

This rule also implements, interprets and makes specific the following provisions of law administered by the Department.

Welfare and Institutions Code section 19100 provides:

"The department shall provide the services defined and authorized by this part [Part 2, "Rehabilitation Services, Programs, and Facilities"] to the physically or mentally impaired who are found to be eligible therefor." [Emphasis added.]

Welfare and Institutions Code section 19150 specifies the numerous vocational rehabilitation services which are to be provided to eligible persons:

"(1) The term 'vocational rehabilitation services' means the following services:

(a) Evaluation, including diagnostic and related services, incidental to the determination of eligibility for and the nature and scope of services to be provided;

(b) Counseling, guidance, and placement services for handicapped individuals, including followup services to assist such individuals to maintain their employment;

(c) Training services for handicapped individuals, which shall include personal and vocational adjustment, books, and other training materials;

(d) Reader services for the blind and interpreter services for the deaf; and

(e) Recruitment and training services for handicapped individuals to provide them with new employment opportunities in the fields of rehabilitation, health, welfare, public safety, and law enforcement, and other appropriate service employment.

"(2) Such term also includes, after full consideration of eligibility for any similar benefit the following services and goods provided to, or for the benefit of, a handicapped individual:

(a) Physical restoration services, including, but not limited to (i) corrective surgery or therapeutic treatment necessary to correct or substantially modify a physical or mental condition which is stable or slowly progressive and constitutes a substantial barrier to employment, but is of such a nature that such correction or modification may reasonably be expected to eliminate or substantially reduce the handicap within a reasonable length of time, (ii) necessary hospitalization in connection with surgery or treatment, (iii) prosthetic and orthotic devices, (iv) eyeglasses and visual services as prescribed by a physician skilled in diseases of the eye or by an optometrist;

(b) Maintenance, not exceeding the estimated cost of subsistence, during rehabilitation;

(c) Occupational licenses, tools, equipment, and initial stocks of supplies;

(d) In the case of any type of small business operated by the severely handicapped the operation of which can be improved by management services and supervision provided by the department the provision of such services and supervision, alone or together with the acquisition by the department of vending stands or other equipment and initial stocks and supplies;

(e) The provision of other facilities and services which promise to contribute substantially to the rehabilitation of a group of individuals but which are not related directly to the rehabilitation plan of any one handicapped individual;

(f) Transportation in connection with the rendering of any vocational rehabilitation service;

(g) Any other goods and services necessary to render a handicapped individual employable;

(h) Services to the families of handicapped individuals when such services will contribute substantially to the rehabilitation of such individuals." [Emphasis added.]

The terms in section 19150 are further defined in Departmental regulations. Title 9, CCR, section 7020, subdivision (e) provides:

"'eligible' or 'eligibility', when used in relation to an individual's qualification for vocational rehabilitation services, means the Department has determined that:

(1) the individual has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment; and

(2) vocational rehabilitation services may reasonably be expected to benefit the individual in terms of employability." [Emphasis added.]

Other regulatory provisions further define the specific services the Department is mandated by statute to provide. For instance, Welfare and Institutions Code section 19150, subdivision (1)(b) refers to "Counseling, guidance, and placement services." [Emphasis added.] Title 9, CCR, section 7152, subdivision (b) supplies the following definition of the term "placement services":

"Placement services shall be provided on an individualized basis and include but are not limited to:

(1) Vocational Exploration

(2) Job Seeking Skills Training

(3) Job Analysis

(4) Job Modification or restructuring

(5) Employer Contacts

(6) Employer/Client Follow-up and Consultation[.]"
[Emphasis added.]

Item 2, job seeking skills training, appears to be the specific service the requester had in mind when he alleged that Southern Regional counselors had been directed to provide only "job skills" and "interview outfits."

Such a directive would dramatically limit the services otherwise available. For instance, the statutory term "any other goods" (section 19150, subdivision (g)) is made specific in Title 9, CCR, section 7165, which provides that, when other alternatives will not solve the problem, a motor vehicle may be purchased for a severely handicapped client with ambulatory restrictions.³⁷

Clearly, the alleged directive implements, interprets and makes specific the above noted provisions of law by indicating which applicants will be deemed "eligible" and which services they will be provided.

WE THEREFORE CONCLUDE THAT THE FIRST ALLEGED RULE (BUDGETARY CASELOAD FIGURES) IS NOT A "REGULATION" AS DEFINED IN GOVERNMENT CODE SECTION 11342, SUBDIVISION (b), BUT THAT THE SECOND ALLEGED RULE (SOUTHERN REGIONAL LIMITS ON WHO IS ELIGIBLE AND WHICH SERVICES THEY CAN RECEIVE) IS A "REGULATION"

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES FALL WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.³⁸

The Department argues that the challenged rules fall within the internal management exception. We need not discuss this argument as it applies to challenged rule one, since we have concluded that challenged rule one is not a "regulation." We cannot accept the argument as applied to challenged rule two (Southern Regional limits on eligibility and services).

An uncodified agency rule will generally be deemed to fall within the internal management exception if the rule (though regulatory in content) affects only employees of the issuing agency.³⁹ Here, the rule clearly affects not only agency employees (Southern Region counselors), but also applicants seeking services. The fact that the alleged rule does not apply on a statewide basis is not dispositive; it need only apply to all members of an "open class" in order to constitute a standard of general application. As discussed above, it does apply to all applicants in the Southern Region

(an "open class"), and thus is a standard of general application and violative of Government Code section 11347.5.⁴⁰

III. CONCLUSION

For the reasons set forth above, OAL finds that:

- I. Challenged rule two (Southern Regional policy limiting eligibility and services) (1) is subject to the requirements of the APA, (2) is a "regulation" as defined in the APA, and (3) therefore violates Government Code section 11347.5 subdivision (a).
- II. Challenged rule one (concerning the budget process) is not a "regulation."

DATE: May 12, 1988

HERBERT F. BOLZ
Coordinating Attorney
Rulemaking and Regulatory
Determinations Unit

- 1 The mailing address for the Office of Administrative Law is 555 Capitol Mall, Suite 1290, Sacramento, CA 95814; the phone number, (916) 323-6225, ATSS 8 473-6225.
- 2 This Request for Determination was filed by Jim Moore, 520 West Dr., Felton, CA 95018, (408) 728-4551. The Department of Rehabilitation was represented by Chief Counsel Elizabeth A. Solstad, 830 K Street Mall, Room 322, Sacramento, CA 95814, (916) 445-0186.
- 3 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Regulatory Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. See also Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CCR). For an additional example of a case holding a "rule" invalid because (in part) it was not adopted pursuant to the APA, see National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (internal legal memorandum informally adopting narrow interpretation of statute enforced by DLR). Also, in Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n.5, 211 Cal.Rptr. 758, 764, n.5, the court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems. In Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857, the court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute. In Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 244 Cal.Rptr. 693 (Cal.App. 2d Dist.), the court found that the Board's auditing selection procedures came within the internal management exception to the APA because they were "merely an internal enforcement and selection mechanism."

- 4 Title 1, California Code of Regulations (CCR), (formerly known as California Administrative Code), section 121(a) provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the Act." [Emphasis added.]

- 5 Government Code Section 11347.5 (as amended by Stats. 1987, c. 1375, sec. 17) provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule is a regulation as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.
2. Make its determination known to the agency, the Governor, and the Legislature.
3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.
2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added.]

6 As we have indicated elsewhere, an OAL determination concerning a challenged "informal rule" is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Regulatory Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5: "The office shall . . . [m]ake its determination available to . . . the courts." (Emphasis added.)

7 One comment was received from the Department of Personnel Administration, Christine Bologna, Chief Counsel. The Department of Rehabilitation submitted a Response to the Request for Determination. Both were considered in making this determination.

In general, in order to obtain full presentation of contrast-

ing viewpoints, we encourage affected rulemaking agencies to submit responses. If the affected agency concludes that part or all of the challenged rule is in fact an underground regulation, it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

- 8 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Gov. Code, sec. 11347.5, subd. (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)
- 9 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on page 1.
- 10 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.
- 11 Sections 19000 through 19856. Reference to sections which are otherwise undesignated are references to the Welfare and Institutions Code.
- 12 Welfare and Institutions Code section 19000.
- 13 Id.
- 14 See Welfare and Institutions Code sections 19011 & 19012. On the federal program generally, see Schornstein v. New Jersey Division of Vocational Rehabilitation Services (D. N.J. 1981) 519 F. Supp. 773, aff'd without op'n (3d Cir. 1982) 688 F.2d 824 (holding that state agency was mandated by federal law to supply interpreter to blind student).
- 15 Welfare and Institutions Code section 19005.1

- 16 The regulatory portions of this Manual have been incorporated by reference into section 7337 of Title 9 of the CCR.
- 17 We discuss the affected agency's rulemaking authority (see Gov. Code, section 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. Such comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

- 18 See also Welfare and Institutions Code section 19016, quoted in the following note.
- 19 Welfare and Institutions Code section 19016 provides:

"The department may prepare and promulgate regulations and statements of policy governing the protection of records and confidential information, the manner and form of filing applications, eligibility and investiga-

tion and determination thereof, for vocational rehabilitation services, procedure for fair hearings and such other regulations and policies as are found necessary to carry out the purposes of this division [division 10 of the Welfare and Institutions Code]." [Emphasis added.]

Though the Department has not raised this point in this proceeding, we will in the interests of thoroughness discuss the argument that section 19016 impliedly exempts the Department from APA rulemaking requirements by its use of the language emphasized in the above quotation. We reject this argument for two reasons: (1) such an interpretation of section 19016 may not be reconciled with the express language of section 19006, which unequivocally requires the Department to comply with the APA; (2) the reference to "policy statements" in section 19016 does not qualify as an APA exemption under the pertinent statutory criteria. As stated in Government Code section 11346, APA exemptions must be (1) express and (2) contained in statutes. The language of section 19016, though statutory, does not expressly exempt the Department from APA rulemaking requirements. We read section 19016 to grant the Department the power to issue non-regulatory policy statements. This reading gives effect to the language concerning policy statements, but in a way that harmonizes Welfare and Institutions Code section 19016 with section 19006 and also with Government Code section 11347.5.

- 20 Government Code section 11342, subdivision (a). See Government Code sections 11343; 11346. See also 27 Ops.Cal. Atty.Gen. 56, 59 (1956).
- 21 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.
- 22 The Ralph C. Dills Act, Government Code sections 3512-3524, formerly known as the State Employer-Employee Relations Act or SEERA.
- 23 We appreciate the Department's well-researched and well-documented Response. This Response helped substantially in unraveling the issues presented by the Request.
- 24 We have supplied the letter designations listed below. The attachments consist of the following: A--a letter on AFSCME stationery, dated June 20, 1986, from Jim Moore to Helen Martin; B--an undated telex message from Helen Martin to the

Southern District Administrators; C--an annotated "The Far Side" cartoon from the Sacramento Bee of January 24, 1986, which has been annotated to suggest that counselors should peacefully comply with complained of quotas; D--a letter dated June 30, 1986, from Helen Martin to Jim Moore; E--an undated typed memo addressed to Mr. Moore, evidently from a counselor in another district office ; F--a memo dated September 16, 1983 from Ferd Shaw to District Administrators; G--an unidentified typewritten page purporting to contain an excerpt from the Dills Act (formerly the State Employer-Employee Relations Act) defining the term "professional employee"; G--a circular concerning a civil service promotional examination for "vocational rehabilitation counselor."

- 25 In its Response (p. 6), the Department states that the "basis of the instant request is a clause in the parties' existing MOU." After carefully reviewing the Request, the Department's Response, and DPA's comment, we conclude that while there is some overlap between the issues raised in the Request and issues previously raised in the collective bargaining context, that the MOU clause is not the "basis" of the Request. The MOU clause was, indeed, the basis of the requester's letter of June 20, 1986, on behalf of the Union, but the mere fact that the requester enclosed that letter does not evince an intent to base the Request on the MOU.
- 26 In light of this conclusion, we need not address the arguments of the Department and of the commenter, the Department of Personnel Administration, that this Request concerns matters within the exclusive jurisdiction of the state Public Employment Relations Board or that material included in labor contracts is impliedly exempt from APA rulemaking requirements and thus not the proper subject of a request for regulatory determination. In the final analysis, we do not view the Request as putting in issue the validity of a labor contract provision in light of AB 1013.
- 27 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1. and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
- 28 Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d

622, 167 Cal.Rptr. 552.

29 Page 5.

30 Response, pages 5 & 6.

31 See Government Code section 13070.

32 See Government Code sections 9140-9143.

33 In a letter dated March 12, 1986, the requester--on behalf of AFSCME--wrote Members of the State Assembly, attacking the Governor's Budget as it concerned the Department. Among other things, Mr. Moore criticized the Department's budgetary plans for requiring counselors to complete greater number of rehabilitation plans.

34 Government Code section 11347.5 is directed at failures to observe the conditions that the Legislature has established on the exercise of quasi-legislative power.

35 In its comment, DPA points out that state employees affected by changed workload standards may bring this matter up in the collective bargaining process.

36 See 1986 OAL Determination No. 6 (Bay Conservation and Development Commission, September 3, 1986, Docket No. 86-002), California Administrative Notice Register 86, No. 38-Z, September 19, 1986, p. B-27; typewritten version, pp. 14-15 (overbroad reading of AB 1013 would impede Executive Branch in performance of its duties, including proposals for statutory or constitutional changes).

37 Section 7165 lists as its Reference (the provision of law it is implementing) 34 CFR 361.42, a federal regulation mandating what the state rehabilitation program must provide, if the state elects to participate in the federally funded program established by the Rehabilitation Act of 1973.

38 The following provisions of law may also permit rulemaking agencies to avoid the APA's requirements under some circumstances, but do not apply to the case at hand:

- a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
- b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
- c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
- d. Rules directed to a specifically named person or group of persons and which do not apply generally or throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
- e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
- f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. The Determination Index, as well as an order form for purchasing copies of individual determinations, is available from OAL, 555

Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8 473-6225. The price of the latest version of the Index is available upon request.

- 39 But see Poschman v. Dumke (1973) 31 Cal.App.3d 932, 944, 107 Cal.Rptr. 596, 603 (internal faculty tenure rule not within internal management exception because it involved matter of serious consequence involving an important public interest).
- 40 Nor would it be a viable defense to argue that the second challenged rule was merely an internal directive to employees instructing them in how to carry out their official duties. The fact that policies affecting applicants were carried out by departmental employees in accord with departmental instructions would not thereby immunize such policies from compliance with the APA. This immunization thesis, if accepted, would effectively exempt from APA compliance any policy carried out by any state employee.

Finally, the APA exemption covering rules directed to a specifically named person or group of persons and not applying throughout the state (Gov. Code sec. 11343, subd. (a)(3)) does not apply here because the alleged Southern Regional rule is not directed to specifically named persons; it is, rather, directed toward two open classes--(1) all Southern Regional counselors (primarily) and (2) all applicants in that region (secondarily, but with significant effect).